ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
	)	
and	)	
	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23 RM-7931
	)	
and	)	
	)	
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules As It Applies to Services Provided Via the Intelsat K Satellite	)	File No. ISP-92-007

REPLY COMMENTS OF TELESAT CANADA

Telesat Canada ("Telesat") hereby submits the following reply comments in response to the Notice of Proposed Rule Making ("NPRM") in the above captioned proceeding, released by the Federal Communications Commission ("FCC" or the "Commission") on 14 May 1996.

16 August 1996

SUMMARY

Telesat Canada is the sole provider of fixed satellite facilities in Canada. In the current NPRM proceeding, the Commission proposes a framework for the delivery of satellite facilities services which may impact all service providers operating in the region. Accordingly, Telesat is pleased to provide its views on the comments received from interested parties on July 15, 1996, and trusts that this input will be helpful to the Commission in its deliberations.

Most of the parties who have commented are generally supportive of measures which promote competition, and Telesat concurs that such proposals are timely in light of other initiatives which are occurring to liberalize telecommunications services. In particular, Telesat notes the comments from several parties that the upcoming WTO negotiations on telecommunications services may have a significant impact on the framework which will result from this NPRM proceeding.

While Telesat recognizes that the adoption of a framework which promotes competition in the delivery of satellite facilities services between countries has many benefits, such a framework should not replace intergovernmental arrangements already in place which have proven to be effective and beneficial in dealing with special circumstances. The effect of applying an ECO-Sat test in such circumstances could be inappropriate, not be in the public interest, and result in the diminishment of competition rather than its promotion.

Telesat also supports the Commission's tentative conclusion that non-U.S. space stations which are duly licensed by a foreign administration should not be subject to a U.S. licensing process, and notes the support of many parties in this regard. Such a process would be inefficient and duplicative and would subject satellite operators to multiple sets of licensing criteria which may ultimately diminish competition.

Many commenters concur with the Commission's proposal to examine access to foreign markets on a service-by-service basis. Telesat agrees that this is a viable approach given that competition in the marketplace is well aligned to different facilities services. Specifically, Telesat believes that the service categories should be defined as DBS, FSS, and MSS services. Furthermore, there is merit in considering frequency bands within FSS (ie. C-, Ku- and Ka-bands) to the extent that such categorization helps to liberalize the delivery of satellite facilities services more rapidly. Notwithstanding, this liberalization depends on a number of technical considerations before it can be implemented, such as the availability of suitable facilities and spectrum coordination.

The Commission has proposed that both *de jure* and *de facto* barriers to competition be addressed in approving applications to access a foreign satellite. Telesat agrees that the burden of proof for demonstrating the existence of *de facto* barriers should fall on opponents of the application. Many parties have stated that much information which is currently filed with the Commission can serve to provide relevant information on market access. In addition to such documented information, Telesat believes that it is critical for the Commission to provide clear and unambiguous guidelines as to what constitutes

barriers to entry to reduce any confusion or uncertainty for applicants and interested parties to future application proceedings.

Telesat's role is as a provider of satellite facilities, and the Company's interest in this proceeding concerns the promotion of competition in the delivery of such facilities services. Accordingly, Telesat submits that the objective of the ECO-Sat test must be to determine if the opportunity exists for all competitors to provide satellite facilities on the same basis within the respective "home markets". In other words, within the respective administration, if the framework is in place which permits all providers of services to compete if they meet the same criteria, this should be adequate to satisfy an ECO-Sat test based on "home market" rules.

Finally, Telesat agrees with the Commission's tentative conclusion, as well as several parties who have submitted comments, that the policy framework resulting from this proceeding should not be retroactive to applications currently before the Commission.

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I. INTRODUCTION AND BACKGROUND

For more than 25 years Telesat has been the sole provider of domestic fixed satellite facilities in Canada. Telesat has a legislated mandate to provide telecommunications services to all parts of Canada including the Far North and rural and remote areas, and is authorized by the Canadian government to provide fixed satellite services on a transborder basis to points between Canada and the United States pursuant to the 1972 and 1982 Exchange of Letters between both governments.[1]

Telesat's current satellite fleet consists of three satellites — Anik C3, E1 and E2. Anik C3 has been in service for more than a decade and is now operating in an inclined orbit. Anik E1 and E2 were both launched in 1991 and are expected to remain in service until early into the next century. Telesat is also involved in the proposed provisioning of four Direct Broadcast Satellite ("DBS") spacecraft to be used jointly by U.S. and Canadian customers, and which are the subject of earth station license applications currently before the Commission.[2]

In the current NPRM proceeding the FCC is proposing to implement a uniform framework for evaluating applications by users in the United States for permission to access satellites licensed by other countries. Under the proposed framework, non-U.S. satellite systems would generally be able to provide satellite services to, from, or within

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[1] Exchange of letters between Kenneth B. Williamson, Minister, Embassy of Canada, Washington, and Bertram W. Rein, Deputy Assistant Secretary for Transportation and Telecommunications, Department of State, Washington, November 6, 7 and 8, 1972; and exchange of letters between Allen Gotlieb, Ambassador of Canada, Washington, and Robert Hormats, Assistant Secretary of State for Economic and Business Affairs, Department of State, Washington, August 24, 1982.

[2] TelQuest Ventures, L.L.C. Application file No. 758-DSE-P/L-96 and 759-DSE-L-96; and Western Tele-Communications, Inc. Application file No. 844-DSE-P/L-96.

the United States to the extent that their markets permit effective competitive opportunities for U.S. satellite systems to provide analogous services. (NPRM ¶ 1)

The framework ultimately adopted in this proceeding could have significant and far-reaching implications for all satellite facility and service providers operating in the region. In this regard, Telesat would note that it is a satellite facility provider and its participation in this proceeding is limited strictly to matters pertaining to competition in the provision of such facilities. In Telesat's view, as long as all satellite facility providers in a particular market are subject to the same content, programming and other national policy rules and requirements, these other matters are not germane to the implementation of a fair and "effective competitive opportunities for satellites" ("ECO-Sat") framework of the type being considered in this proceeding.

Telesat notes that most parties that filed submissions in the comment round of this proceeding are generally supportive of the overall thrust of the Commission's ECO-Sat framework to expand the freedom of satellite operators to supply services in North American and regional markets. To the extent that the proposed framework does relate to the promotion of satellite facility competition between and among U.S. and non-U.S. satellite operators in these markets, Telesat is also generally supportive of the overall thrust of the proposed framework and believes this policy reexamination is timely in light of the wholesale changes that are occurring both within the satellite industry and the global market economy in general. Notwithstanding, Telesat agrees with the view of many participants that the Commission's proposed policies establish a framework which could result in several sets of bilateral rules which may ultimately be superseded by the upcoming WTO negotiations on telecommunications.

As like most telecommunications industry sectors, the satellite industry is evolving quickly in the face of rapid technological advancement, escalating customer demands for lower prices and greater service functionality, and the inexorable trends of increased competition and market globalization. These forces, and the international trade deals they have spawned, are all contributing to the development of ever more tightly integrated North American, regional and global service economies. In this new environment, size and an ability to diversify and to negotiate strategic alliances and partnerships are becoming increasingly more important determinants of carrier viability and the ability to launch new ventures.

In the case of the North American satellite industry in particular, the future viability of small satellite fleet operators is uncertain at best. To continue to compete effectively in the increasingly integrated North American service economy, operators such as Telesat will have to rapidly evolve from being purely domestic facility providers to becoming operators of North American and international satellite systems. This necessary transition can likely be achieved only through increased partnering or joint ventures with other satellite operators and service providers on both sides of the Canada/United States border.

To this end, Telesat is prepared to support Canadian government policy initiatives or changes required to liberalize North American satellite facility markets, beginning with DBS facilities and continuing with C, Ku and Ka-band satellite facilities, once it has the appropriate, full-coverage facilities in place.

Telesat believes that a transition process of this sort is not only necessary for Telesat to remain a financially viable satellite facility provider but is also conducive to the orderly development of a sustainable, fully competitive North American satellite facility market.

Moreover, such a transition process could result in full Canadian/U.S. North American facilities competition in all FSS and DBS service markets within the next three to five years without giving any one satellite facility provider an unfair competitive head start.

It is against this backdrop that Telesat offers the following reply comments to the submissions filed by other parties on the Commission's proposed ECO-Sat framework.

II. THE ECO-SAT FRAMEWORK

Under the basic ECO-Sat framework put forward in the NPRM, the FCC is proposing to examine the "home market" of the non-U.S. satellite plus any other "route markets" to which service from a U.S. earth station is proposed. In each such market, the Commission would seek to determine whether there are any *de jure* or *de facto* barriers to entry constraining U.S. satellite systems that may wish to provide a service analogous to that which the non-U.S. satellite system proposes to provide. Following this determination, the Commission would then consider whether any additional countervailing public interest factors would support a result different from the one that would be reached under the ECO-Sat analysis alone. In implementing the framework, the Commission notes that it does not intend to require satellite systems already licensed in other jurisdictions to obtain U.S. space station licenses, but rather would permit these systems to gain access to U.S. markets by licensing earth stations to operate with non-U.S. satellite systems as has been the practice in the past. (NPRM ¶¶ 2, 12)

1. **Support is widespread for the adoption of an ECO-Sat framework but its implementation should not be at the expense of pre-existing mutually beneficial arrangements involving the United States and its trading partners.**

Telesat recognizes and accepts the principle of reciprocity that underlies the proposed ECO-Sat framework. Specifically, if a foreign satellite facility provider wishes to gain entry, on a facilities basis, to another satellite facility provider's "home market", the other carrier should have access to similar opportunities in the foreign satellite facility provider's market. As indicated above, Telesat believes that access to Canadian satellite markets by U.S. satellite facility providers should be allowed over the next few years as Telesat launches facilities of its own which are capable of serving the whole North American market.

Telesat notes that general support for implementing an ECO-Sat framework is widespread. In this regard, most parties agreed that such a framework would promote fair and open competition among satellite systems throughout the region, to the benefit of U.S. and foreign consumers through lower prices, increased service alternatives and more innovative features and service offerings.

While Telesat is in general agreement with this assessment of an appropriately implemented ECO-Sat framework, it is concerned with suggestions that an ECO-Sat framework should govern all situations involving American user access to a non-U.S. licensed satellite system. In Telesat's view, this would go too far in that it would appear to render null and void all previously negotiated cross-border satellite service agreements, including the 1972 and 1982 Exchange of Letters between Canada and the United States referred to above, nor should future addenda or other such agreements be superseded by the ECO-Sat test.

As the Commission is aware, these Letters were an explicit recognition that there are special circumstances where it would be in the interests of both countries not to preclude the use of the other country's satellite systems to provide assistance to satellite facility operators and users in their respective home markets. As set out in the 1972 Letters, these circumstances include situations of a catastrophic failure of a satellite system, a shortage of adequate facilities, and cases of a cross border extension of service where such service is essentially incidental and peripheral to an otherwise domestic service. The 1982 Letters provided further clarification to the 1972 Letters to allow for other cross border arrangements where mutual benefit would result.

Experience since the first Letters were exchanged clearly demonstrates that these arrangements have proven extremely beneficial to the two countries, both in facilitating the introduction of telecommunications services on a cross border basis and in responding to capacity shortages. On a number of occasions, for example, following this spirit of cooperation, Telesat facilities have been used by various U.S. satellite service operators to bolster or restore service to U.S. customers in situations of system failure or other capacity limitations. Telesat was similarly assisted by U.S. satellite system operators in restoring service to its Canadian customers at the time of the Anik E2 failure in 1994.

Several participants in this proceeding have cited other examples of where the proposed ECO-Sat framework may go too far and restrict competition rather than enhance it.

Alphastar voices similar concerns about applying the ECO-Sat test to new U.S. earth station applications involving service from the United States via non-U.S. licensed space stations which the Commission has routinely authorized in the past. Telesat agrees with

Alphastar's assertion that subjecting new applicants for previously authorized services to an ECO-Sat analysis could unnecessarily delay these applications and cause a competitive disparity between previously licensed earth station operators and the new applicants, and that this would clearly not serve the public interest.

In this vein, Telesat similarly supports the request made by Japan Satellite Systems ("JSAT") in its submission that the Commission confirm that the adoption of an ECO-Sat test will not undo previous public interest determinations made by the Commission where it has been found that effective competitive opportunities exist.

A number of other parties also expressed concerns about too rigid an application of the ECO-Sat framework, particularly in situations where U.S. space system capacity is limited. For example, Capital Cities/ABC, CBS, National Broadcasting Company and Turner Broadcasting System state at page 16 of their joint submission that:

> "At least for international video service transmissions, the Commission should apply the ECO-Sat test based only on practical 'effective competitive opportunities,' not on theoretical 'effective competitive opportunities.' In other words, the Commission should forbear from applying the ECO-Sat test where there are no alternative sources of satellite capacity with the requisite power, bandwidth and coverage (footprint) to provide the international video transmission services at issue."

Similarly, General Instrument Corporation (GI) notes at page 2 of its comments that it too is concerned that:

> "since new space on U.S. satellites is today effectively exhausted from certain orbital locations, such as DBS, the only possibility of *supply-increasing and price-decreasing competition* is from non-U.S. satellites. Therefore, it is of

concern whether an effective competitive test, such as the one proposed in the Notice, would capture this supply problem." (emphasis in original)

As noted above, a new framework need not supersede pre-existing arrangements which have been proven to be in the public interest in addressing situations such as a shortage of adequate capacity. GI goes on at pages 7 and 8 to state that:

> "GI generally agrees with the proposal set forth in this Notice that U.S. users will benefit from greater access to services provided over non-U.S. satellites. By encouraging a more open policy with regard to satellite-delivered services, the U.S. takes an important first step in opening its borders to competition and in doing so encourages other countries to do the same. Consumers will ultimately be the beneficiaries of this important first step due to more service choices and both price and quality competition. This is especially true in the current situation where space on U.S. satellites is exhausted. Non-U.S. satellite resources should be permitted to deliver services to U.S. consumers when resources are not available from domestic satellites to meet consumers' needs. One example is domestic DBS service. There currently is no space available from U.S. orbital locations to deliver DBS services into the U.S. from new competitors seeking to enter this market. In instances such as this, an evaluation of reciprocal trade barriers serves no purpose. Actually, it may send the wrong message resulting in net losses to U.S. consumers and producers. Thus, the public interest would be served by allowing non-U.S. satellites to provide these services without further delay."

At page 5 of their joint submission, Newcomb Communications and Mobile Datacom Corporation note that the ECO-Sat framework as proposed "may not be a sufficient framework for services which are developing, have immediate requirements, or for which U.S. licensed satellite capacity is either insufficient, economically impractical or unavailable." In such situations, Newcomb and Mobile Datacom submit that the non-availability of U.S. capacity should be the overriding factor in considering an application

to access non-U.S. satellite system capacity regardless of whether or not an ECO-Sat test is met, as otherwise the U.S. public may be prevented from receiving the service at all.

Therefore, Telesat agrees that strict enforcement of an ECO-Sat test in all future instances is not likely to serve the pubic interest. Particularly in situations of scarce U.S. domestic capacity, the public interest would be better served by eschewing application of an ECO-Sat analysis, and authorizing the use of non-U.S. capacity. Any proposal to apply an ECO-Sat analysis in such circumstances would detract from dealing with the relevant issue- sufficient capacity to serve the U.S. market- and potentially defeat the objective of increasing competitive choices.

2. **The re-licensing of non-U.S. space stations would be redundant under an ECO-Sat framework and application of the Commission's Part 25 rules concerning legal, financial and technical requirements to non-U.S. licensed space stations is not warranted.**

In the NPRM the Commission indicated that the public interest would not likely be served by requiring non-U.S. systems to obtain space station licenses from the United States before serving the U.S. market. The Commission noted that such licenses would be redundant, since ITU procedures call for each satellite to be registered and coordinated internationally by only one administration. The Commission further noted that many foreign administrations would understandably expect the United States to accept the sufficiency of their satellite licensing procedures, just as the United States would expect other administrations to accept the sufficiency of U.S. procedures. In light of this, the Commission tentatively concluded that it should regulate access to non-U.S. satellites primarily through the licensing of earth stations that communicate with these satellites. (NPRM ¶ 14)

Telesat agrees with the Commission's tentative conclusion and notes that most other parties who filed comments were also in agreement with this conclusion. Typical in this regard was the comment of Orion Network Systems: "to require an operator already licensed by its 'home' administration to obtain a separate space station license in each foreign market which it desires to serve would be inefficient, duplicative, and an impediment to expanding international free trade in the satellite arena." (Comments of Orion Network Systems, p. 4) In order for this policy to be sustainable, it must be recognized that licensing criteria and approvals in foreign countries will differ from those which the Commission would normally require for the licensing of a U.S. space station.

Where there was less agreement was on the Commission's proposal that non-U.S. satellite systems proposing to serve U.S. markets must demonstrate that they meet all technical, financial, and legal requirements set out in Part 25 of the Commission's Regulations. The Commission tentatively concluded that such a showing was necessary in order to ensure that the non-U.S. satellite will be able to provide service in a timely manner and without interference to U.S. satellite systems. (NPRM ¶¶ 53, 61)

As Orion points out, however, the proposed requirement:

> "squarely conflicts with [the] stated intention 'to accept the sufficiency of satellite licensing procedures abroad — as we expect (foreign administrations) to accept the sufficiency of our procedures'. ... In essence, it pays only lip service to the foreign licensing scheme by simply moving the entry barrier to another position in the regulatory process, and it invites foreign administrations to do the same to U.S.-licensed operators." (Comments of Orion Network Systems, p. 5)

At page 20 of their joint comments, DIRECTV, DIRECTV INTERNATIONAL and Hughes Communications (collectively, "Hughes") similarly agree that this proposal far exceeds the requirements that are necessary to protect U.S. interests, and that such requirements could have serious repercussions for U.S. satellites seeking to operate abroad. According to Hughes, the U.S. interest properly lies in ensuring that non-U.S. satellites do not cause harmful interference to U.S. licensees and can co-exist with U.S. satellites. The Commission has no legitimate interest in requiring non-U.S. operators to comply with its legal and financial requirements for U.S. operators.

Comments submitted by TRW, Keystone Communications, Columbia Communications, Comsat, and Worldcom also generally oppose a dual licensing regime which would be unnecessarily redundant, and it has been noted that the ITU coordination process is sufficient to ensure that all technical requirements are met.

Telesat agrees that application of Part 25 rules to non-U.S. licensed satellite systems is tantamount to a re-licensing of these systems and therefore contrary to the Commission's tentative conclusion that non-U.S. licensed space stations should need not be re-licensed.

3. **Implementing the ECO-Sat framework following a facility-by-facility approach is most conducive to the orderly and rapid development of a fully-liberalized North American satellite service market.**

In the NPRM the Commission proposes to conduct its ECO-Sat analysis based on the following service categories: Direct-to-Home satellite service (DTH) including true Direct Broadcast Satellite (DBS) service; Fixed Satellite Service (FSS); and Mobile Satellite Service (MSS). The Commission also proposes not to divide the service categories into voice, video or data, to distinguish VSAT service from FSS, nor to draw a rigid distinction between international and domestic service. In following this approach,

the Commission states that it is seeking to promote fair competition in each submarket and hopes to expand competition in the United States as soon as countries undertake even an incremental opening of their satellite service markets. (NPRM ¶¶ 34-36)

While there was a general consensus that an "incremental approach" was the most appropriate way for the Commission to proceed, some parties advocated a further breakdown or disaggregation of the proposed service categories. Orion Network Systems, for example, while claiming to be sympathetic to the Commission's desire to simplify the analysis, argued that conducting an analysis based only on broad service categories (DTH, FSS, MSS) without regard to relevant subcategories (e.g., VSAT, voice, video, and data) could be less effective at creating incentives for foreign administrations to open their markets fully. According to Orion, to encourage unrestricted market access across the range of services, non-U.S. satellites should not be permitted to engage in any service subcategory that would be closed to US entities in that foreign operator's home or route markets. However, as Orion goes on to acknowledge, its proposed approach could be "somewhat complicated". (Comments of Orion Network Systems, p. 9)

In its submission, TRW urges the Commission to take a flexible and pragmatic approach to service category determinations it intends to use for the purpose of an ECO-Sat analysis. According to TRW, the same service denomination may mean quite different things to different operators, and foreign administrations may choose to define and/or regulate services using different definitions than those used in the United States. TRW therefore concludes that it is unlikely that the barriers that exist abroad to market entry by U.S. satellite systems will correspond neatly to any "rule of thumb" service categories employed by the Commission for this purpose. (Comments of TRW, p. 26)

Telesat agrees with TRW that the Commission should have some flexibility in its approach, but is concerned that too great a degree of flexibility could result in more than a "somewhat complicated" approach to conducting an ECO-Sat analysis. Telesat therefore supports the Commission's tentative conclusion that the ECO-Sat framework should be designed, at least in the first instance when examining competitive opportunities in any foreign jurisdiction, to look separately at broad service categories or facilities competition in the provision of FSS, MSS and DBS services. As the Commission suggests, this approach will provide prospective entrants with greater certainty as to when they can enter and what types of satellite facilities they could provide in the U.S. market.

It should be noted that in the context of provision of satellite facilities, "DBS" would be the applicable service instead of "DTH", as the latter market definition applies to end-user services provided by programming distributors and not satellite operators. Therefore, from Telesat's perspective, the relevant service categories are DBS, FSS and MSS.

A variant on this approach which should be considered would entail a further break out of FSS facilities by frequency band (e.g., C, Ku and Ka band) where these facilities are focusing on different service markets. By further breaking down barriers to entry at a broad category or facility level, this would mean that increased competitive alternatives could be brought to some satellite market segments much sooner than would otherwise be the case. In this regard, Telesat notes that Teledesic in its comments has proposed a separate category for emerging interactive broadband satellite services which would be largely composed of Ka-band systems.

The Commission's proposed incremental approach also ties in well with the notion that a transitional process is necessary to introduce fully-open North American satellite facilities market. In this regard, Telesat would note that the present generation of Anik E FSS satellites were engineered and deployed to provide coverage for all of Canada, including the Far North in accordance with the obligations of Telesat's current mandate. Accordingly, their coverage of the North American market as a whole is limited, particularly with respect to Ku-band services in comparison to the coverage of many U.S. satellite systems. Under these current circumstances, Telesat would be limited in its ability to compete effectively in the total North American market, and any throwing open of Canadian markets in the guise of promoting North American competition could have negative consequences for Telesat and the Canadian satellite industry generally.

To promote sustainable North American competition among Canadian and U.S. satellite system operators, it is first necessary for Telesat to deploy satellite facilities capable of serving most if not all of the North American market prior to the introduction of wide-open competition with U.S. competitors who already have good coverage of all the major populated areas of Canada.

Satellite coordination considerations also come into play here. Under the Tri-Lateral Arrangement between the United States, Mexico and Canada, the C-band and Ku-band orbit positions of Mexico and Canada are grouped together in the arc between 107.3° WL and 118.7° WL. The Mexican satellite orbital positions are interstitial with those of Canada, and are separated by a spacing of 1.9° from the Canadian positions. This arrangement of interleaving the Canadian and Mexican satellites provides each country with the benefit of wider spacing (3.8°) between its own satellites but with restrictions concerning coverage of the United States. Coordination of the Canadian and Mexican satellites and also the design of domestic satellite networks has been based on the fact

that the satellite antenna coverage of the Canadian and Mexican satellites does not fully cover the United States. Canadian satellite coverage rolls off in the U.S. as it approaches the Mexican border, and similarly Mexican coverage of the U.S. is largely limited to the southern United States. Thus, Canadian and Mexican domestic satellites, in general, do not have full coverage of the United States, particularly at Ku-band.

To provide effective competitive satellite service in the United States would require the next generation Canadian Anik (and Mexican Solidaridad) satellites be designed to improve their coverage of the United States. This may pose some technical problems for both Canada and Mexico, as their earth station networks have been designed assuming low levels of interference from the adjacent satellites of the other country. If the satellite coverage of the Canadian and Mexican satellites were suddenly modified to include full coverage of the United States, this could result in harmful and unacceptable interference to some networks operating on the Solidaridad and Anik Satellites. Thus, the modification of the two countries' domestic satellites to enable, as an option, the coverage of the United States, will require careful coordination and possibly the modification of some existing earth station networks.

Therefore, for both of these reasons, a phased-in approach to the introduction of a full facilities liberalization policy will be necessary. During this period, issues related to multi-lateral licensing policies and coordination for space stations must be adequately dealt with.

To reduce the anti-competitive effect of this potential head start for U.S. satellite providers offering coverage of the entire North American market, and therefore to reduce the necessary transition time before a full liberalization policy can be implemented, it will be necessary that any available steps be taken to facilitate the ability of Canadian

satellites to provide full North American coverage. One such opportunity already exists with the pending applications of TelQuest Ventures, L.L.C. and Western Tele-Communications, Inc. to provide DBS services using satellites located in Canadian orbital positions. Approval of these applications would be a key first step in ushering in full North American competition. Denial, however, would push back the date when both Canadian-licensed satellites and U.S.-licensed satellites are capable of offering DBS facilities that cover the entire North American market. Denial would deal a serious blow to full North American competition for satellite facilities.

4. ***De jure* and *de facto* barriers to competitive entry should be considered in an ECO-Sat analysis but should be carefully spelled out and appropriately examined.**

With regard to the ECO-Sat test and the criteria to be used to determine whether barriers to competitive entry exist in the non-U.S. satellite facility market under scrutiny, the Commission has indicated that it would first consider whether U.S. satellite systems are prohibited by law or regulation from competing with other satellite systems to provide a service in a foreign market. Should no such *de jure* restrictions exist, the Commission has indicated it would then proceed to consider whether any *de facto* or practical barriers to entry come into play limiting the provision of service by U.S. satellite systems. The Commission further notes that because it is not proposing a "checklist" of *de facto* barriers, it would be appropriate to require those who oppose market entry for non-U.S. systems to bear the burden of demonstrating the existence of any such entry barriers. (NPRM ¶¶ 37, 42)

There was much support for the Commission to consider both *de jure* and *de facto* barriers to entry in conducting an ECO-Sat analysis. However there was no consensus as to how the burden of proving the existence or non-existence of any such barriers should

be shared between the earth station applicant and opponents of the application. For example, some commenters proposed that the full burden should be shouldered by the earth station applicant (TRW, Columbia); others noted that these applicants may be small and that the full burden should therefore fall on opponents of the application (Worldcom); while still others suggested a public notice be issued on the application with opponents to first prove their case with the burden of proof to then shift to the applicant (Panamsat).

Telesat supports the Commission's tentative conclusion that the burden of proof as to the existence of *de facto* barriers to entry should be shouldered by those opposing market entry into the U.S. market. However, without clear and unambiguous guidelines as to the precise nature and scope of what would be considered a *de facto* entry barrier in these instances, Telesat is concerned that the open endedness of this portion of the evaluation process could be a source of confusion and uncertainty and lead to inconsistent application of the policy. In addition, it lends itself to abuse of the process as competitors would have an incentive to impede entry by raising any issue that may even remotely suggest a barrier to entry in the non-U.S. systems home market. Even if these claims are ultimately found to be unsubstantiated or frivolous in nature, delays and added costs will ensue.

Moreover, while it may not be possible for the Commission to construct an exhaustive "checklist" of impermissible *de facto* barriers, Telesat submits that a fairly comprehensive listing and explanation by the Commission as to what in its estimation would constitute a valid entry barrier for the purposes of an ECO-Sat analysis is necessary. Such a listing and description would serve to remove much uncertainty as well as mitigate against competitor abuse of the process.

In this regard, Telesat also notes and agrees with the concern expressed at page 2 in the comments filed by Japan Satellite Systems ("JSAT"):

> "the examination of '*de jure and de facto*' barriers to competition proposed in the Notice appears to be quite broad. JSAT believes that to the extent that the Commission has proposed to formalize its public interest inquiry into an ECO-Sat test, the Commission should provide more definitive and specific guidance as to how the test will be applied, or perhaps channel the analysis through more specific standards or criteria. For example, the Commission should be mindful to limit the applicability of the ECO-Sat analysis to *communications*-oriented laws and policies; if the Commission falls into an overly broad and rigid 'reciprocity' approach, the Commission's inquiry risks involving the Commission in non-communications related disputes, such as complex trade and foreign policy issues, that are more appropriately addressed in other forums." (emphasis in original)

Telesat also supports JSAT's proposal at page 3 of its submission that, when the Commission conducts an ECO-Sat analysis, it do so according to a definitive, pre-specified time frame. As JSAT correctly notes,

> "long time frames for resolving an ECO-sat inquiry can jeopardize or eliminate business opportunities for both U.S. and the non-U.S. providers. Because such regulatory delay does not serve the Commission's goals of promoting effective global competition, JSAT strongly urges the Commission to cabin the ECO-Sat inquiry within reasonable, expeditious time deadlines, both for filing and resolving petitions to deny and for rendering a final decision."

To facilitate the determination as to which foreign markets offered effective competitive opportunities the Commission also proposed that U.S. satellite operators be required to file, on a periodic basis, a listing of all foreign destinations where they are permitted to

provide service, as well as a general description of the services they are permitted to provide. (NPRM ¶ 39)

A number of U.S. satellite operators, including Columbia, Loral, Orion and Panamsat, oppose this requirement, claiming that the information supplied would be of limited usefulness and that it would be burdensome to compile this information. Telesat disagrees with this assessment and in this regard would simply note AT&T's comments on this matter found at page 12 of its submission:

> "Requiring all U.S.-licensed satellite operators to inform the Commission in writing of all foreign destinations where they are permitted to provide service annually and whenever an operator obtains access to an additional foreign market will enable the FCC International Bureau to compile and release this information in aggregate form. This will assist in determining whether effective competitive opportunities exist or continue to exist in particular foreign markets... Moreover, such annual reporting is identical to the frequency of circuit status reports that U.S. facilities-based carriers are currently required to provide to the Commission, and such a requirement would impose no undue administrative burden."

In this regard Telesat agrees with the suggestion that, as an option, the non-U.S. operator seeking to serve the U.S. market could also supply information directly to the Commission demonstrating the lack of entry barriers in its home and route markets. As AT&T notes, this option could ease the burden of demonstrating compliance with an ECO-Sat requirement on earth station applicants as well as enhance the efficiency of the process, owing to the likelihood that the non-U.S. operator would have superior access to information necessary to make the ECO-Sat showing.

Telesat also sees merit in the similar proposals made by Comsat, Home Box Office and Capital Cities/ABC et al to the effect that the Commission could allow a non-U.S.

satellite operator to seek a declaratory ruling that it satisfies the ECO-Sat test for its home and specific route markets. As these parties suggest, once the Commission declared that a non-U.S. satellite satisfied the test for specific markets, it should allow all U.S. authorized earth station licensees to access the non-U.S satellite immediately for the specified home and route markets.

5. **The objective of an ECO-Sat analysis should be to determine if satellite facility providers would be allowed to compete on essentially equal terms under "home market" conditions.**

Telesat would also submit that in considering what constitutes an entry barrier for the purposes of an ECO-Sat analysis, differences in regulatory or other public policies affecting the delivery of services in the other country compared to what exists in the U.S. domestic market should not on their face be considered as indicative of an entry barrier. Rather, the analysis of the regulatory and public policy situation in the foreign country should focus on whether the market in question is open to a U.S. satellite service facility operator and whether the same rules and policies which guide the domestic satellite facility operator's provision of service — i.e., "home market" rules — would be equally applicable to the U.S. operator.

These "home market" rules include the respective legal and regulatory provisions of that country such as any "content" or broadcast policy requirements, which were specifically identified as problematic by some parties in their comments. For example, at page ii of its comments, MCI asserts that "satellite transmission is inextricably linked to content in the provision of DBS/DTH services", and that laws and regulations that directly limit the ability of U.S. satellite operators to supply such programming in a foreign market can be as damaging to fair and vigorous competition as laws that restrict satellite transmission service.